

## Municipal Home Rule in Wisconsin

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# MUNICIPAL HOME RULE IN WISCONSIN

ROBERT W. HANSEN

THE degree of local autonomy to be exercised by municipal corporations has for many years been a subject of discussion by legislators, jurists, academicians, writers, and citizens generally. It is a matter concerning which there has always been considerable difference of opinion. Self-government for local communities has been defended as necessary to prevent cities from becoming ineffectual subdivisions of state governments, mere satrapies of the central authority. On the other hand, complete local autonomy has been attacked as creating a multitude of city-states, each community an *imperium in imperio*. In Wisconsin this matter of home rule has been a subject of debate and controversy for more than a quarter century.<sup>1</sup> Certain it is that in this commonwealth the advocates of municipal home rule have waged a long and weary struggle, marked by pyrrhic victories and Sisyphean accomplishments. Their march through the desert to the Promised Land has brought them to many mirages, but to few oases. The story of the development of the Wisconsin law on the relationship between state and local governments is an absorbing one.

Historically speaking, it is probably true that in Wisconsin and elsewhere we have followed the New England township governments. M. De Tocqueville, one of the keenest foreign observers of the American system of government, over one hundred years ago made the observation that the New England towns were "small independent republics over matters of local concern," remarking, "they are independent in all that concerns themselves, and among the inhabitants of New England I believe that no man is found who acknowledges that the state has any right to interfere in their local interests." This distinction between state and local autonomy "always obtained in Continental Europe, originating in the feudal system. \* \* \* One of the fundamental principles of that system was local autonomy. When joined with the Roman idea of corporate capacity, it resulted in the recognition of local government corporations having a sphere of local autonomy apart from the state as a whole."<sup>2</sup>

Among early Wisconsin cases there is definite recognition of so-called "inherent" powers of municipal corporations, those powers which are necessary to the existence of the corporation and which are not dependent upon state grant or charter. Certain early cases requiring municipal assent to legislative ratification of a harbor construction contract<sup>3</sup> and protecting the town's vested rights in private

<sup>1</sup> Van Gilder v. City of Madison, (Wis. 1936) 267 N.W. 25, 268 N.W. 108.

<sup>2</sup> GOODNOW, MUNICIPAL HOME RULE, 109-110.

<sup>3</sup> Hasbrouck v. City of Milwaukee, 13 Wis. 42 (1860).

property,<sup>4</sup> while probably based on constitutional restrictions, indicate acceptance of the viewpoint that the municipality possessed inherent rights. In the original charter granted the City of Milwaukee, the legislature provided "that the city shall have the general powers possessed by municipal corporations at common law."<sup>5</sup> What such inherent powers and common law prerogatives included was never clearly detailed,<sup>6</sup> and is no longer of more than academic interest, for the reason that the proposition that cities possess inherent powers was first questioned,<sup>7</sup> and later repudiated by the Wisconsin Supreme Court.<sup>8</sup> Today, in this jurisdiction, municipalities have or can exercise only such power as is conferred by express or implied power of law,<sup>9</sup> including therewith powers incident to powers expressly granted and those indispensable to the declared object and purposes of corporation.<sup>10</sup> The present day trend is definitely away from the earlier concept of the municipal corporation possessing inherent powers.<sup>11</sup>

In their efforts to secure some general grant of power over local affairs, municipal administrators relied upon the "general welfare clause" in municipal charters.<sup>12</sup> (This clause customarily granted power and authority to manage finances and to enact ordinances for the government and good order of the city, for the benefit of trade, commerce, and health, for the suppression of vice, for the prevention of crime, etc.) But the supreme court, in a case concerning the validity of a City of Milwaukee ordinance forbidding operation of elevators except by duly licensed operators, held that, where the general grant was followed by specific grants of power, such specific grants acted

<sup>4</sup> *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93 (1860).

<sup>5</sup> Wis. Laws (1852) c. 56 § 1.

<sup>6</sup> "The general powers possessed by municipal corporations at common law are words of very general import and an attempt to point out all the acts which they might be held to authorize would be a work of considerable labor." *Miller v. City of Milwaukee*, 14 Wis. 699 (1861). See also *Butler v. City of Milwaukee*, 15 Wis. 546 (1862); *Clason v. City of Milwaukee*, 30 Wis. 316 (1872).

<sup>7</sup> *Jones v. Kolb*, 56 Wis. 263, 14 N.W. 177 (1882).

<sup>8</sup> " \* \* \* all the powers of the corporation are derived from the law and its charter." *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N.W. 864 (1900).

<sup>9</sup> *Flannagan v. Buxton*, 145 Wis. 81, 129 N.W. 642 (1911); *City of Superior v. Roemer*, 154 Wis. 345, 141 N.W. 250 (1913); *Wisconsin Ass'n. of Master Bakers v. City of Milwaukee*, 191 Wis. 302, 210 N.W. 707 (1926); *Town of Swiss v. United States Nat. Bank*, 196 Wis. 171, 218 N.W. 842 (1928).

<sup>10</sup> *State v. Kelly*, 154 Wis. 482, 143 N.W. 153 (1913); *City of Milwaukee v. Raulf*, 164 Wis. 172, 159 N.W. 819 (1916); *State v. Duluth & Superior Bridge Soc.*, 171 Wis. 283, 177 N.W. 332 (1920); *First National Bank of Milwaukee v. Town of Catawba*, 183 Wis. 220, 147 N.W. 1013 (1924). See for reference *Schneider v. City of Menasha*, 118 Wis. 298, 95 N.W. 94 (1903).

<sup>11</sup> "A municipality is merely a department of the state and the state may withhold, grant, or withdraw powers or privileges as it sees fit. However great or small its sphere of activity it remains the creature of the state exercising and holding its powers and privileges subject to the sovereign will." *Trenton v. New Jersey*, 262 U.S. 182, 43 Sup. Ct. 534, 67 L.ed. 937 (1923).

<sup>12</sup> See *City of Milwaukee v. Gross*, 21 Wis. 243 (1866).

as a restriction upon the general welfare clause.<sup>13</sup> To strengthen local government control over municipal affairs the legislature passed an act providing that a city might alter its charter at a charter convention.<sup>14</sup> This was a short-lived advance for the courts held that "legislative delegation of authority to make a city charter or any part of it—a power other than to adopt a legislative creation—would be a delegation of legislative power and void."<sup>15</sup>

Cities of the first class<sup>16</sup> were granted additional "possible power and leeway of action" by the home rule clause which in substance provided that specific grants of power should not be construed as restrictions upon the general welfare clause, and urged "liberal construction" of powers granted to such cities.<sup>17</sup> The Wisconsin Supreme Court commented that "\* \* \* this legislation was intended to broaden the power of cities of the first class."<sup>18</sup> and in a subsequent decision restated the right of such cities, in absence of any restriction by the state, to exercise powers incidental to general powers granted by state authority.<sup>19</sup> This was the state of the law until the passage of the home rule amendment to the Wisconsin constitution.

Statewide agitation for recognition of local autonomy over matters of municipal or local concern persisted, and in 1924 the voters by referendum ratified an amendment to the Wisconsin constitution providing that "cities and villages organized pursuant to state law" were to have the power to "determine their local affairs and government, subject only to this constitution and to such enactments of statewide concern as shall with uniformity affect every city or every village."<sup>20</sup> Home rule advocates felt that, despite problems earlier suggested,<sup>21</sup> they had, to quote the language of another court, secured for municipi-

<sup>13</sup> Chain Belt Co. v. City of Milwaukee, 151 Wis. 188, 193, 138 N.W. 621 (1912).

<sup>14</sup> "Every city in addition to powers now possessed is hereby given authority to alter or amend its charter, or to adopt a new charter by convention, in the manner provided in this act, and for that purpose is hereby granted and declared to have all powers in relation to the form of its government and to conduct its municipal affairs not in contravention of or withheld by the constitution or laws operating generally throughout the state." Wis. Laws (1911) c. 476.

<sup>15</sup> State *ex rel.* Mueller v. Thompson, 149 Wis. 488, 138 N.W. 628 (1912).

<sup>16</sup> This classification included then and includes now only Wisconsin's largest city, i.e., Milwaukee.

<sup>17</sup> Wis. Laws (1913) c. 678.

<sup>18</sup> Milwaukee v. Filer & Stowell Co., 161 Wis. 426, 154 N.W. 625 (1915).

<sup>19</sup> City of Milwaukee v. Raulf, 164 Wis. 172, 159 N.W. 819 (1916).

<sup>20</sup> Wis. CONST. art. xi § 3.

<sup>21</sup> Query "whether the grant of home rule includes power to regulate matters pertaining to taxation, eminent domain, police, health, education, streets, the ownership of public utilities, etc." and suggestion that "\* \* \* if the plan were adopted of accompanying the general grant of self-government power with a specific enumeration of powers within what might be called the twilight zone, it would be a matter of no great difficulty." See McBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE.

pal corporations, "enjoyment of a large measure of organic independence," and freedom from "officious legislation which seeks to interfere with the private or proprietary functions" of local agencies.<sup>22</sup> After some time had elapsed it became apparent that the task of distinguishing local affairs from state affairs, and matters of municipal concern from matters of statewide concern might not yet be over. Some suggested that the words used in the constitutional amendment suggested inquiry rather than answered it. Although the court stated that "the recognized purpose of this amendment was to confer upon cities and villages a measure of self-government not heretofore possessed,"<sup>23</sup> it also felt inclined to prophesy that "the probable hopes of the ardent advocates of the home rule idea—to see the municipality divorced from the legislature and a separate sovereign within the sovereign state—are destined to a rude shock."<sup>24</sup>

Some of the difficulties involved in precisely defining the term "matters of statewide concern" are apparent. Any standard suggested is more likely to prove subjective in character than objective. What may appeal to one person or one court as purely local in character may suggest itself to another as a matter of statewide concern. What is quite local in character today may not be so tomorrow. In the "horse-and-buggy" days of an earlier era it is quite conceivable that maintenance of village streets could be placed in the category of local affairs. Today when trucks and busses drive from city to city, village to village is it still so? Before the advent of the automobile, traffic regulations were of concern only to inhabitants of the particular communities involved thereby. Have they not become a matter of state and nationwide importance today? At least one court has concluded that the term "municipal affairs" is not a fixed quantity but fluctuates with every change in the conditions upon which it operates.<sup>25</sup> Other problems suggest themselves. Treating of sewage and waste material may be argued to be a matter of individual concern to the community involved, but will the communities downstream so regard it? Smoke inspection would seem to be a concededly urban problem in which rural sectors of the state would have no concern. But if it is shown to have a direct effect upon the health of city residents, would the state's interest in advancement of the health of its citizenry transplant it into the matters of statewide concern? If a local affair is one concerning problems which arise through the concentration of population in a given urban community, would not police administration be local. But our court has held otherwise, and there is a definite state-

<sup>22</sup> *Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30 (1913).

<sup>23</sup> *State ex rel. Sleeman v. Baxter*, 195 Wis. 437, 219 N.W. 858 (1928).

<sup>24</sup> *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 209 N.W. 860 (1926).

<sup>25</sup> *Helmer v. Superior Court*, 48 Cal. App. 140, 191 Pac. 1001 (1920).

wide concern in maintaining law and order and preventing crime. Our court has held that although cities are not of dual nature,<sup>26</sup> they do have two kinds of functions. But if the standard is to be that proprietary functions are presumed to be local in character and governmental functions statewide, are we not by this test back to the demonstrated difficulties involved in accurately separating municipal functions? With the changing nature of governmental problems, with the difficulty of determining state and local, private and governmental functions, admitting that state and local government functions necessarily overlap,<sup>27</sup> we are almost compelled to accept a piecemeal development of the law of home rule,<sup>28</sup> and must content ourselves with considering each case as it arises applying those principles which precedent and logic approve.<sup>29</sup>

One of the first cases in which the Wisconsin Supreme Court addressed itself to defining the term "matters of statewide concern" resulted from the refusal of municipal officials to concede the validity of legislation raising the limit of taxation for school purposes, claiming that the repair of school buildings is a local affair and that said law conflicted with the rights of the city under the home rule amendment. The court held the matter of education is one of statewide concern by virtue of constitutional provisions,<sup>30</sup> and stated, "School buildings are an essential agency in the state's educational scheme. It follows that the so-called home rule amendment imposes no limitation upon the power of the legislature to deal with the subject of education, and this applies to every agency created or provided and to every policy adopted by the legislature having for its object the promotion of the cause of education throughout the state."<sup>31</sup> Thus the field of education in its entirety is clearly subject to legislative control and not within the purview of the home rule amendment.

Some months later there arose the question of whether regulations concerning the heights of buildings fell into the field of local affairs or were to be considered to be "matters of statewide concern." The court held " \* \* \* the height of buildings in cities is of statewide concern under the rule heretofore recognized that health and safety regulations

<sup>26</sup> *City of Racine v. Levitan*, 196 Wis. 604, 220 N.W. 398 (1928).

<sup>27</sup> *Van Gilder v. City of Madison*, (Wis. 1936) 267 N.W. 25, 268 N.W. 108.

<sup>28</sup> "The developments which have been made in the law of municipal home rule have been more or less piecemeal during past years." Dawley, *Special Legislation and Municipal Home Rule* (1932) 16 MINN. L. REV. 659.

<sup>29</sup> *Carlberg v. Metcalf*, 120 Neb. 481, 234 N.W. 87 (1930).

<sup>30</sup> "The legislature shall provide by law for the establishment of district schools which shall be as nearly uniform as practicable, and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years, and no sectarian instruction shall be allowed therein." WIS. CONST. art. x, § 3.

<sup>31</sup> *State ex rel. Harbach v. Mayor, etc. of Milwaukee*, 189 Wis. 84, 206 N.W. 210 (1925).

are not merely for occupants and visitors of particular buildings but for the people of the community and for the community at large<sup>32</sup> \* \* \* yet nevertheless the height of buildings in particular communities is a problem which much more intimately and directly concerns the inhabitants of that community than the casual visitor or other parts of the state, it is a 'local affair'.<sup>33</sup> This case introduces a new element into the situation; the phrase "much more" indicates that in this jurisdiction there will be a balancing of concerns, and that matters of some concern to the state will be considered "local affairs" if they more directly and intimately concern the particular community involved. Whether this much clarifies the situation is a question upon which reasonable minds might differ.

The important question of whether police administration is a "matter of statewide concern" subject to legislative control or whether it is a local affair reserved to the municipality under the home rule amendment was presented to the supreme court in the case of *Van Gilder v. City of Madison*.<sup>34</sup> This was an action for recovery of salary due the administratrix of a deceased Madison policeman. The plaintiff contended that the local charter ordinance was invalid. By that ordinance the city of Madison had chosen to reject the statewide statute covering policemen's salaries and the local common council had purported to reduce policemen's salaries by ordinance. The court, pausing to remark that terms "matter of statewide concern" as used in the constitution "are practically indefinable" held that the charter ordinance in question was invalid and held the matter of fire and police protection to be a "matter of statewide concern" for the following reasons (summarized): (1) The legislature exercises a sovereign power of the people limited only by constitutions; (2) the preservation of order, the protection of life and property, and the suppression of crime are primary functions of all civilized states; (3) in respect to performing these functions municipalities are merely agencies of the state; (4) the legislature has the power to rearrange the laws by which these duties are discharged; (5) delegation of duty in these regards to municipalities does not alter the situation; (6) the length of time of delegation of these duties does not affect a state's right to control over these functions. Thus police administration in this state, as in other jurisdictions,<sup>35</sup> has been held to be a matter of statewide

<sup>32</sup> Citing Building Height Cases, 181 Wis. 519, 195 N.W. 544 (1923); *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923).

<sup>33</sup> *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 209 N.W. 860 (1926).

<sup>34</sup> (Wis. 1936) 267 N.W. 25, 268 N.W. 108.

<sup>35</sup> "Nor can such cities say to the state: You may man and control the police force if you desire, but, if so, we will starve your system to death. We hold the purse strings. These municipal corporations are subject to the sovereign power of the state, and whilst they do in a sense hold the purse strings they

interest, subject to legislative rearrangement. An important contribution to the law of home rule contained in the *Van Gilder* case is the emphasis placed in the decision upon the fact that the legislature had declared the provisions of the statute involved to be "an enactment of statewide concern."<sup>36</sup> The court states that the determination of what is a "matter of statewide concern" would seem to be for the legislature "for the reason that such a determination must involve large considerations of public policy." This is in accord with the general rule that matters of public policy are for the legislature,<sup>37</sup> and means that subject to limitations of the constitution, determinations by the legislature, though not absolutely controlling, are "entitled to great weight." This holding definitely moves the home rule advocates back into the legislative arena which they originally sought to avoid. It shifts the responsibility for definition of terms back to the state legislature.

Prevention and suppression of fires are definitely items of statewide concern under the reasoning and holding in the *Van Gilder* case. In other jurisdictions, cases are not in accord as to whether statutes relating to municipal fire departments are void as violating rights of self-government under home rule. Some decisions hold that fire fighting is a governmental or public function,<sup>38</sup> while others hold that it is a proprietary or corporate function and therefore local.<sup>39</sup> In a recent case, the Wisconsin Supreme Court has determined that the state laws providing for fire and police commissions are enactments of statewide concern, and has summarily disposed of the claim that the manner in

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do so by consent of the state. Without the authority of the sovereign they would not have a purse much less the strings of one. The power which gave them the purse can limit the use of it. The power which put upon that purse the strings can loosen the strings." State *ex rel.* Reynolds v. Jost, 262 Mo. 51, 175 S.W. 591 (1915); " \* \* \* protection of life and property and preservation of the public peace and order is a government duty which devolves upon the state not the municipality." Hawes v. Mason, 153 Mo. 23, 54 S.W. 524 (1899); but see Branch v. Albee, 71 Or. 188, 142 Pac. 598 (1914), stating, "As a policeman is appointed by the city and his salary is paid by the city, and most of his duties are municipal, he is in proper sense, a city officer although he is also a peace officer and may make arrests under state law."

<sup>36</sup> Wis. Laws (1935) c. 193.

<sup>37</sup> *Jessner v. State*, 202 Wis. 184, 231 N.W. 634 (1930); *Julien v. Model B. L. & I. Ass'n.*, 116 Wis. 79, 92 N.W. 561 (1902); *Borgnis v. Falk*, 147 Wis. 327, 133 N.W. 209 (1911).

<sup>38</sup> Operation of a fire department "is a governmental function not a municipal one." *Smidly v. Memphis*, 140 Tenn. 97, 203 S.W. 512 (1918); "members of a fire department are public or state officers." State *ex rel.* *Haberlan v. Love*, 89 Neb. 149, 131 N.W. 196 (1911).

<sup>39</sup> "The duty of that department is confined to suppression of fires arising within the municipal limits. Those living outside the municipality are not affected by the performance of this duty unless they visit the municipality or have property within its limits. The possibility of that occurrence does not make the department a state agency." *Davidson v. Hine*, 151 Mich. 294, 68 S.W. 477 (1908).



which fire and police officials are chosen is a local affair.<sup>40</sup> Whatever distinctions between these two branches of public service may prevail elsewhere, in Wisconsin both fire and police departments are subject to legislative control.

One other case remains to be considered. It is the New York decision, which the Wisconsin court called "very illuminating and one of the most authoritative discussions" on the subject. In this case a multiple dwelling law was held to be legislation of statewide concern because it affected the health of the community, which to quote the majority opinion "has more to do with the general prosperity and welfare of a state than its wealth or learning or culture."<sup>41</sup> In a concurring opinion, Chief Judge Cardozo comments that "The Multiple Dwelling Act seeks to bring about conditions whereby healthy children shall be borne and healthy men and women reared, in the dwellings of the great metropolis. To have such men and women is not a city concern merely." He inquires, "If the moral and physical fiber of manhood and womanhood is not a state concern, the question is what is?"<sup>42</sup> In a spirited dissent, Judge O'Brien complains that, judged by this standard, "There is scarcely an act of local government that cannot be tortured into one of sovereignty."<sup>43</sup> If the reasoning of the majority opinion in this New York case is followed in Wisconsin decisions, it is reasonable to assume that the local court's statement that their interpretation "leaves a rather narrow field in which home rule can operate freed from legislative restriction"<sup>44</sup> will be, if anything, an understatement.

To summarize the present state of the law in regard to home rule, one can state that, in dealing with matters affecting education, fire-fighting, police administration, promotion of health, and other phases of government activity determined to be of "statewide concern," the legislature deals with them free from any restriction contained in the

<sup>40</sup> Logan v. Two Rivers, (Wis. 1936) 267 N.W. 36.

<sup>41</sup> Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929).

<sup>42</sup> "There may be difficulty, at times, in allocating interests to the state or municipality, and in marking the respective limits when they seem to come together. \* \* \* A zone exists, however, where state and city concerns overlap and intermingle. \* \* \* although they may be a concern of the city they are subject nonetheless to regulation through the usual forms of regulation if they are concerns of the state also." Cardozo, C. J., concurring opinion, Adler v. Deegan, *supra*, p. 484.

<sup>43</sup> "Few statutes could be proved to be exclusively local in their indirect influences. A law fixing the site of a garbage incinerator on a certain street in Buffalo could by an elastic interpretation be shown to have some remote effect on health of travelers from Duluth to Syracuse. \* \* \* Non-residents might stumble and fall in an unlighted hallway of a multiple dwelling. Many are known to have done the same on a defective sidewalk. \* \* \* Its (Multiple Dwelling Law) relation to the state as a whole is so negligible as to be almost entirely remote." O'Brien, J., dissenting opinion, Adler v. Deegan, *supra*, p. 505.

<sup>44</sup> Van Gilder v. City of Madison, *supra*, note 34.

home rule amendment. The power to classify cities in this regard remains unimpaired. When the legislature deals with local affairs of a city, such as establishing building height restrictions, if its act is not to be subordinated to a charter ordinance, the act must be one which applies with uniformity to every city. If in dealing with local affairs, the legislature classifies cities, that act is subordinate to a charter ordinance relating to the same matter.<sup>45</sup> Whatever new developments the future may bring, it is apparent that the commentator who wrote "the long movement in Wisconsin for municipal home rule ended with the adoption of the constitutional amendment"<sup>46</sup> was somewhat mistaken, although he very correctly prophesied that "The reform was advocated generally by political scientists, but now, with the reform adopted, the remaining problems are for the legal profession."

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<sup>45</sup> Summarized from *Van Gilder v. City of Madison*, *supra*, note 34.

<sup>46</sup> Note (1926) 3 WIS. L. REV. 423.

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